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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON

10 JOYCE LATTIN,

Civil No. 05-6152-AA  
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,  
14 Commissioner of Social Security,

15 Defendant.

16 \_\_\_\_\_  
17 Kathryn Tassinari  
18 Mark Manning  
19 Cram, Harder, Wells & Baron, P.C.  
20 474 Willamette, Suite 200  
21 Eugene, Oregon 97401  
22 Attorneys for plaintiff

23 Karin Immergut  
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Attorneys for defendant

AIKEN, Judge:

Claimant, Joyce Lattin, brings this action pursuant to the

1 Social Security Act (the Act), 42 U.S.C. §§ 405(g), 1383(c)(3), to  
2 obtain judicial review of a final decision of the Commissioner.  
3 The Commissioner denied plaintiff's application for Disability  
4 Insurance Benefits (DIB) under Title II of the Social Security  
5 Act, and for Supplemental Security Income (SSI) disability  
6 benefits under Title XVI of the Act. Id. For the reasons set  
7 forth below, the Commissioner's decision is affirmed and this  
8 case is dismissed.

#### 9 **PROCEDURAL BACKGROUND**

10 Plaintiff protectively filed her application for DIB and  
11 SSI benefits on March 7, 2002. She alleged an inability to work  
12 beginning June 28, 1992, due to lupus, fibromyalgia, arthritis,  
13 diabetes mellitus, and kidney problems. Tr. 45-46, 56. Her date  
14 last insured was December 31, 1997. Tr. 13. A claimant seeking  
15 disability insurance benefits must establish that she was  
16 disabled on or before her date last insured. See 20 C.F.R. §§  
17 404.131, 404.315-21. Plaintiff must prove that she was disabled  
18 on or before December 31, 1997, in order to be eligible for DIB  
19 under Title II.

20 In September 2002, plaintiff's applications were denied  
21 initially, tr. 25-29, and in March 2002, upon reconsideration.  
22 Tr. 31-33. On February 16, 2005, after a hearing, the  
23 Administrative Law Judge (ALJ) ruled that plaintiff was not  
24 disabled. Tr. 10-20. The Appeals Council, denied plaintiff's  
25 request for review. Tr. 4-7. The ALJ's decision thus became the  
26 final agency decision. See 20 C.F.R. §§ 404.981, 416.1481,  
27 422.210 (2005). On May 19, 2005, plaintiff filed the complaint  
28 at bar.

1                                   **STATEMENT OF THE FACTS**

2           Born in 1951, plaintiff was 40 years old on the alleged  
3   disability onset date of October 10, 1992, and 52 years old at  
4   the time of the hearing. Tr. 46, 10-20. Plaintiff graduated  
5   from high school, and has past work experience as a clerk, video  
6   store manager, and sales representative. Tr. 95, 103.

7                                   **STANDARD OF REVIEW**

8           This court must affirm the Secretary's decision if it is  
9   based on proper legal standards and the findings are supported by  
10   substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
11   498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
12   mere scintilla. It means such relevant evidence as a reasonable  
13   mind might accept as adequate to support a conclusion."  
14   Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
15   Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
16   The court must weigh "both the evidence that supports and  
17   detracts from the Secretary's conclusions." Martinez v. Heckler,  
18   807 F.2d 771, 772 (9th Cir. 1986).

19           The initial burden of proof rests upon the claimant to  
20   establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
21   (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
22   an "inability to engage in any substantial gainful activity by  
23   reason of any medically determinable physical or mental  
24   impairment which can be expected . . . to last for a continuous  
25   period of not less than 12 months. . . ." 42 U.S.C.  
26   § 423(d) (1) (A) .

27           The Secretary has established a five-step sequential  
28   process for determining whether a person is disabled. Bowen v.

1 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
2 416.920. First the Secretary determines whether a claimant is  
3 engaged in "substantial gainful activity." If so, the claimant  
4 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
5 §§ 404.1520(b), 416.920(b).

6 In step two the Secretary determines whether the claimant  
7 has a "medically severe impairment or combination of  
8 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
9 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
10 disabled.

11 In step three the Secretary determines whether the  
12 impairment meets or equals "one of a number of listed impairments  
13 that the Secretary acknowledges are so severe as to preclude  
14 substantial gainful activity." Id.; see 20 C.F.R.  
15 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
16 presumed disabled; if not, the Secretary proceeds to step four.  
17 Yuckert, 482 U.S. at 141.

18 In step four the Secretary determines whether the claimant  
19 can still perform "past relevant work." 20 C.F.R.  
20 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
21 disabled. If she cannot perform past relevant work, the burden  
22 shifts to the Secretary. In step five, the Secretary must  
23 establish that the claimant can perform other work. Yuckert, 482  
24 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
25 (f). If the Secretary meets this burden and proves that the  
26 claimant is able to perform other work which exists in the  
27 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,  
28 416.966.



1 2004 disability opinion of Dr. Muller, plaintiff's treating  
2 physician; and (2) rejected plaintiff's testimony as not  
3 credible.

4 1. Opinion of Dr. Muller

5 \_\_\_\_\_Plaintiff saw Dr. Muller beginning February 1992, and again  
6 in January and March 1993. In March 1993, Dr. Muller opined that  
7 plaintiff had done "quite well" after a course of physical  
8 therapy, that her pedal edema was "resolved," that her shoulder  
9 had just a "little bit of tenderness," and that her neck had only  
10 "a little bit of decrease in range of motion." Tr. 304.  
11 Finally, Dr. Muller recommended that plaintiff swim to increase  
12 her range of motion, control her weight, decrease her blood  
13 pressure, and improve her physical conditioning. Id.

14 Plaintiff did not see Dr. Muller again for any impairment-  
15 related problem for three years, until May 1996, when he stated  
16 that her weight was 216 pounds, she had no sign of significant  
17 rheumatoid disease, and she had multiple tender points on her  
18 back and shoulder. Tr. 302. Dr. Muller diagnosed possible  
19 fibromyalgia, bloating, abdominal pain, hair loss, and sinus  
20 congestion. Id. Dr. Muller then treated plaintiff for gout in  
21 one of her right toes in October 1996, but x-rays showed no other  
22 foot abnormalities. Tr. 301.

23 Dr. Muller next treated plaintiff in January 1998, when she  
24 reported "she now no longer has any swelling" and "felt  
25 marvelous." Tr. 301. In June 1998, Dr. Muller diagnosed  
26 plaintiff with hypertension. Tr. 300. In September 1998,  
27 plaintiff reported that edema occurred "quite rarely" and Dr.  
28 Muller opined that "her joints seem to be much improved with the

1 use of prednisone." Id. In December 1998, Dr. Muller diagnosed  
2 plaintiff with lupus with kidney, joint, and eye manifestations,  
3 and prescribed Plaquenil. Tr. 298.

4 In January 1999, Dr. Muller opined that plaintiff was  
5 "doing pretty well," had no recent eye irritations, and that her  
6 joints, except for her right shoulder, felt better. Tr. 297.  
7 Later in January 1999, plaintiff reported right foot pain and  
8 left eye "floaters" and right eye dilation. Tr. 297. In March  
9 1999, plaintiff reported that a right shoulder steroid injection  
10 "instantly" helped and Dr. Muller stated that "now she is able to  
11 lift things and do exercises without any difficulties." Tr. 296.  
12 Dr. Muller stated that Plaquenil "has really helped a lot with  
13 her functionality" and that despite the lupus, her joints were  
14 "okay." Id.

15 In May 1999, Dr. Muller diagnosed plaintiff with benign  
16 positional vertigo and stated that her diabetes and hypertension  
17 were stable. Tr. 299. In June 1999, Dr. Muller opined that "she  
18 has not been having any significant problem" from lupus. Tr.  
19 296. In September 1999, plaintiff reported she had more energy  
20 and a better attitude. Id. Dr. Muller stated that plaintiff's  
21 glucose levels were stable, she had no joint swelling, no vision  
22 problems, and that she had improved after she exercised more and  
23 dieted. Id.

24 Plaintiff was not treated by Dr. Muller in 2001. In March  
25 2002, plaintiff's cervical x-ray showed "straightening of the  
26 normal curvature consistent with spasm," but no acute fractures  
27 or dislocations. Tr. 394. In April 2002, Dr. Muller opined that  
28 plaintiff's hypertension and diabetes were largely stable, but

1 she reported feeling depressed and feeling "crumby" as a result  
2 of lupus. Tr. 248. In June 2002, a kidney ultrasound showed  
3 "mild" pyelocaliectasis (dilation of the calices, usually due to  
4 obstruction or infection). In August 2002, plaintiff reported  
5 right upper quadrant pain, but a colonoscopy showed no  
6 significant problems. Tr. 278. Again in August 2002, based on  
7 plaintiff's reported right Achilles tendon pain, Dr. Muller  
8 diagnosed her with tendonitis, but opined that her lupus was  
9 "reasonably well controlled." Tr. 245. In February 2003,  
10 plaintiff reported that she had no visual difficulty when driving  
11 and no night vision problems, but she reported difficulty  
12 reading. Tr. 233.

13 In February 2003, orthopedist Dr. Hobson, examined  
14 plaintiff, who weighed 240 pounds and was in no apparent  
15 distress. Tr. 261. He opined that her upper and lower  
16 extremities were normal with the exception that her right ankle  
17 had "some swelling," although her right foot had "good motor and  
18 sensory function." Id. Dr. Hobson interpreted plaintiff's right  
19 foot x-rays to show Achilles tendonitis, recommended a right foot  
20 walker with a heel lift, and planned for her to begin physical  
21 therapy in six weeks. Id.

22 In April 2003, Dr. Muller opined that plaintiff was doing  
23 "reasonably well" with diabetes, had "okay" vision, and that her  
24 right Achilles tendon was "somewhat stiff," but noted that she  
25 did ankle range of motion exercises. Tr. 276. In June 2003,  
26 plaintiff's blood sugars were "running excellently," and she was  
27 "doing better" on collagen hydrolysate, but she reported heel  
28 pain consistent with plantar fascia irritation. Tr. 274. In



1 September 2003, Dr. Muller opined that plaintiff's lupus and  
2 diabetes were "doing reasonably well" and plaintiff reported no  
3 right foot problems. Tr. 271. In November 2003, Dr. Muller  
4 opined that plaintiff's hypertension was "stable" and stated that  
5 her pain and tenderness from lupus decreased with use of indocin.  
6 Tr. 268.

7 Plaintiff submitted no further records from Dr. Muller, and  
8 presumably did not see him after November 2003. In September  
9 2004, however, Dr. Muller completed a form at the request of  
10 plaintiff's counsel which stated as follows:

11 1. What are the diagnoses?

12 Systemic lupus Erythematosus

13 NIDDM [non-insulin dependent diabetes mellitus]

14 HTN [hypertension]

15 2. What are the objective medical findings upon  
16 which the diagnoses are based?

17 Physical Exam

18 Laboratory values

19 Consultation

20 3. What are the symptoms?

21 Arthralgia

22 Fatigue

23 Joint swelling

24 4. Are the conditions capable of causing these  
25 symptoms?

26 Yes

27 5. In your opinion, based upon the above definition  
28 [of sedentary and light work], is [plaintiff]  
capable of light work?

No.

Lifting is okay, but walking is not possible due to  
joint swelling, pain, and decreased mobility.

6. If, in your opinion, [plaintiff] is not capable  
of light work, would she be capable of a full range  
of sedentary work?

No.

I feel she could not even do 2 hrs. of walking/standing  
in a shift.

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1           7. Is [plaintiff] unable to sustain work activity  
2           on a full-time basis in either the sedentary or  
3           light work categories due to the exacerbation of  
4           her medical condition?

5           [Yes,] Unable to sustain either sedentary or light work.

6           Tr. 406-07.

7           The ALJ must provide specific and legitimate reasons to  
8           reject a treating physician's contradicted opinion of disability,  
9           and clear and convincing reasons for rejecting uncontradicted  
10          treating physician's opinions. Magallanes v. Bowen, 881 F.2d  
11          747, 751 (9<sup>th</sup> Cir. 1989).

12          The ALJ rejected Dr. Muller's September 2004, disability  
13          assessment because he found "no documentation of any medication  
14          treatment other than January 2004 chemical panels, since November  
15          2003." Tr. 17. Further, the ALJ found that pursuant to Dr.  
16          Muller's September 2, 2003, report, "plaintiff presented with 'no  
17          particular problems' as her hypertension, lupus, and diabetes  
18          were all seen as being controlled 'reasonably well.'" Id. The  
19          ALJ noted that during Dr. Muller's August and September, 2003  
20          examinations/reports, plaintiff's "hypertension, blood sugars,  
21          and even weight were all seen to be 'running excellently[.]'"  
22          The ALJ accorded Dr. Muller's opinion that plaintiff would be  
23          precluded from walking or standing even 2 hours, and unable to  
24          perform even sedentary work, "less weight as they lack durational  
25          support of objective signs and laboratory findings, even within  
26          the treatment notes and reports of that same physician." Id.

27          The ALJ rejected Dr. Muller's 2004 disability opinion  
28          because: (1) plaintiff received no medical treatment after  
            November 2003; (2) Dr. Muller's last examination of plaintiff was  
            benign; and (3) Dr. Muller's opinion that plaintiff could not

1 stand or walk for even two hours a day was unsupported by his own  
2 treatment record. Tr. 14-18. During plaintiff's last two  
3 physical examinations, neither Dr. Muller nor plaintiff mentioned  
4 any difficulty in her ability to stand or walk. Tr. 17, 18, 268,  
5 271. In September 2003, plaintiff's extremities were "without  
6 cyanosis, her lupus, hypertension, and diabetes were all non-  
7 problematic, and Dr. Muller planned "[j]ust reassurance" and to  
8 "[c]ontinue all medications." Tr. 271.

9 Essentially, after plaintiff's application for benefits was  
10 denied, and without ever re-examining plaintiff, Dr. Muller  
11 responded to plaintiff's attorney that plaintiff was unable to  
12 perform even sedentary work. Tr. 406-07. An opinion solicited  
13 after an individual is found not disabled is not persuasive,  
14 particularly when it is inconsistent with earlier statements.  
15 Weetman v. Sullivan, 877 F.2d 20, 23 (9<sup>th</sup> Cir. 1989).

16 Further, the ALJ relied on Dr. Hobson's February 2003,  
17 orthopedic examination which contradicted Dr. Muller's disability  
18 opinion. Tr. 18. See 20 C.F.R. §§ 404.1527(d)(5),  
19 416.927(d)(5) ("we generally give more weight to the opinion of a  
20 specialist about medical issues related to his or her area of  
21 speciality[.]"). Plaintiff told Dr. Hobson that she did not ice  
22 her foot, had not done physical therapy, and did not wear a brace  
23 and that heat, elevation and rest improved the right heel pain.  
24 Tr. 260. Dr. Hobson, an orthopedic specialist, opined that  
25 plaintiff's lower extremities had normal alignment, range of  
26 motion, strength, and stability, except that she had "some  
27 swelling" of her right ankle and that her right Achilles tendon  
28 was tender. Tr. 261. Dr. Hobson diagnosed plaintiff with

1 tendonitis, which he treated "in the acute phase" with a foot  
2 walker and icing. Id. Dr. Hobson recommended that plaintiff  
3 begin physical therapy in about six weeks. Id. An examining  
4 doctor's opinion constitutes substantial evidence in support of  
5 an ALJ's decision. Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9<sup>th</sup>  
6 Cir. 2001).

7 The ALJ also partially relied on opinions from Drs. Kehrli  
8 and Eder, non-examining physicians who opined that plaintiff  
9 could perform light work with some limitations. Tr. 18, 235-38.  
10 A non-examining physician's opinion may amount to substantial  
11 evidence as long as other evidence in the record supports those  
12 findings. Tonapetyan, 242 F.3d at 1149. The ALJ actually found  
13 that plaintiff's residual functional capacity was more limited  
14 than Drs. Kahrli and Eder assessed. The ALJ also limited  
15 plaintiff from working around hazards, climbing ladders, ropes or  
16 scaffolds, and from working at heights. Tr. 20.

17 In conclusion I find that the ALJ rejected Dr. Muller's  
18 opinion because it was inconsistent with other evidence; and it  
19 was not well supported by medically acceptable clinical and/or  
20 laboratory diagnostic studies. Tr. 14-18. The ALJ adequately  
21 analyzed the evaluations and other opinion evidence that  
22 contradicted Dr. Muller's opinion. Id. The ALJ then provided  
23 specific and legitimate reasons to reject Dr. Muller's disability  
24 opinion. Tr. 17-18.

## 25 2. Plaintiff's Testimony

26 The ALJ found that plaintiff was not totally credible. Tr.  
27 17-18. In assessing a plaintiff's credibility, an ALJ may  
28 consider: (1) ordinary techniques of credibility evaluation, such

1 as prior inconsistent statements concerning the symptoms and  
2 testimony by the plaintiff that appears less than candid; (2)  
3 unexplained failure to seek treatment; (3) daily activities; and  
4 (4) medical evidence which discounts the severity of subjective  
5 claims. Rollins v. Massanari, 261 F.3d 853, 856-57 (9<sup>th</sup> Cir.  
6 2001).

7 Specifically, an ALJ may discredit a plaintiff's subjective  
8 complaints by identifying inconsistencies between her complaints  
9 and activities of daily living. Thomas v. Barnhart, 278 F.3d  
10 947, 958-59 (9<sup>th</sup> Cir. 2002). In discrediting plaintiff's  
11 subjective complaints, the ALJ noted that plaintiff here engaged  
12 in cooking, shopping, housekeeping, laundry, self-grooming  
13 activities, reading, watching TV, computer/internet activities  
14 30 - 120 minutes at a time, exercise on her stationary bike three  
15 times per week, gardening 1 - 1 ½ hours at a time, and driving.  
16 Tr. 18. Plaintiff reported that her chores were done "very  
17 well," and that she cared for her pet "adequately." Id., tr. 80-  
18 81, 88-90, 443, 448-49. The ALJ found plaintiff's reported  
19 activities of daily living inconsistent with disability and  
20 therefore the ALJ properly discredited plaintiff's subjective  
21 complaints.

22 An ALJ may also consider a lack of supporting objective  
23 medical evidence as a factor in discrediting a plaintiff's  
24 subjective complaints. Thomas, 278 F.3d at 958-59. The ALJ  
25 summarized the medical evidence and noted that plaintiff had "no  
26 documentation of any medication treatment other than January 2004  
27 chemical panels, since November 2003." Tr. 17. The ALJ also  
28 found that plaintiff "presented with 'no particular problems' as

1 her hypertension, lupus, and diabetes were all seen as being  
2 controlled 'reasonably well.'" Tr. 17, 271. Finally, the ALJ  
3 noted that plaintiff did not report Achilles tendon problems  
4 after April 2003. Tr. 17.

5 Despite the fact that plaintiff selected June 1992 as her  
6 alleged disability onset date, the ALJ noted that this was  
7 "apparently based on surgical procedures" performed at that time  
8 and that thereafter, she recovered and continued to drive and  
9 engage in a wide range of daily activities. Tr. 17-18. It was  
10 not until plaintiff had been denied disability benefits that her  
11 treating physician completed plaintiff's attorney's form and  
12 stated that she could not perform even sedentary work. Tr. 406-  
13 07. The ALJ conducted an extensive review of the record and  
14 found that the examining, treating and reviewing sources through  
15 2003 did not opine that plaintiff was disabled, or support that  
16 level of disability. The lack of objective medical evidence, as  
17 noted by the ALJ here, to find that plaintiff's subjective  
18 complaints were not totally credible is one appropriate factor,  
19 among others, in the credibility analysis. The ALJ's finding  
20 that plaintiff was not totally credible was supported by the lack  
21 of objective medical evidence and by the inconsistencies between  
22 her complaints and her activities of daily living.

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1 **CONCLUSION**

2 The Commissioner's decision is based on substantial  
3 evidence, and is therefore, affirmed. This case is dismissed.  
4 IT IS SO ORDERED.

5 Dated this 21 day of February 2006.

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8  
9 /s/ Ann Aiken

10 Ann Aiken

11 United States District Judge  
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